No. 5624

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN VERNON QUAYLES AND HOPE VIRGINIA FINN, *Appellants,*

vs.

THE CITIZENS NATIONAL BANK OF SALMON, IDAHO, a Corporation, *Appellee.*

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Idaho; Southern Division

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CHARLES D. TARLING,
Residence: Boise, Idaho,
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STATEMENT OF THE CASE

This is a suit in equity brought by the appellants, John Vernon Quarles and Hope Virginia Finn, citizens and residents of the State of California, as plaintiffs in the Court below, against the Citizens National Bank of Salmon, Idaho, as defendant. The plaintiffs were minors when the acts set forth in the complaint and

answer happened and were performed, but had reached the age of majority when this action was commenced.

The bill of complaint alleges that sometime prior to the 31st of May, 1922, one G. B. Quarles, who is shown by the evidence to be the father of plaintiffs, was indebted to the plaintiffs, who were then minors, in the amount of about $4,490.88, and that for the purpose of protecting the plaintiffs in their property rights the District Court of Lemhi County, Idaho, on May 31, 1922, appointed one H. L. McCaleb as guardian *ad litem* of the said plaintiffs for the purpose of prosecuting an action in their favor against said G. B. Quarles; that said McCaleb as guardian *ad litem* prosecuted an action on behalf of plaintiffs against the said G. B. Quarles and that judgment was entered in the District Court of Lemhi County, Idaho, in his favor as such guardian *ad litem* and against said G. B. Quarles, for $4,490.88. It is then alleged that after the entry of said judgment, and about the 1st of June, 1922, said G. B. Quarles being unable to pay and discharge the judgment, and desiring to avoid execution being taken out against him, and desiring to secure the payment of the judgment, made and delivered to said McCaleb as guardian *ad litem* for the plaintiffs a chattel mortgage covering, among other things, a certain building known as the "Wool Warehouse" located on the right-of-way of the Gilmore & Pittsburgh Railroad in Salmon, Idaho. A copy of the chattel mortgage is attached to the complaint and the same shows that it was duly filed for record in the office of the County Recorder of Lemhi County, Idaho, on June 1, 1922. It is then alleged that about the month of September, 1922, said

McCaleb, acting in the interests of plaintiffs, but without their knowledge or consent, foreclosed the chattel mortgage in accordance with Sections 6380 to 6384 of the Idaho Compiled Statutes, which provide for the foreclosure of chattel mortgages by affidavit placed in the hands of the Sheriff and sale made by the Sheriff upon short notice; that the Sheriff obtained peaceable possession of this property and sold the same on September 30, 1922, at public sale to the plaintiffs, who were represented in the matter by Rose Loring Quarles; that she bid the property in for the sum of $25.00, and the Sheriff delivered her a bill of sale and that said Rose Loring Quarles thereupon took possession of said wool warehouse on behalf of the plaintiffs.

The evidence shows that Rose Loring Quarles is the second wife of G. B. Quarles; that the indebtedness upon which the suit by McCaleb as guardian *ad litem* against him is based was for sums advanced him by his deceased wife, the mother of the plaintiffs herein.

The complaint alleges that Rose Loring Quarles bid the wool warehouse in and purchased the same in the interest and for the use and benefit of the plaintiffs and for the purpose of protecting their property rights, the plaintiffs then, and for a long time thereafter, being minors; that prior to the commencement of the present suit Rose Loring Quarles duly assigned, transferred and set over to the plaintiffs all of her right, title and interest acquired under said sale in and to said wool warehouse and all rights to an accounting from the defendant for the use and occupation of the wool warehouse and for the reasonable rental value thereof; that plaintiffs have acquired and hold all right, title

and interest in the wool warehouse acquired by said Rose Loring Quarles and all right to receive and demand from the defendant a full and complete accounting for the use and occupation of the wool warehouse by the defendants and all rights to damages due from the defendant to said Rose Loring Quarles.

It is then alleged that on the 15th day of April, 1922, the defendant had commenced an action against G. B. Quarles in the District Court for Lemhi County, Idaho, and on the 17th day of April, 1922, the Sheriff of Lemhi County pretended to levy a writ of attachment issued in said cause on the wool warehouse; that the Sheriff pretended to appoint a custodian to take possession of said property, but that neither the Sheriff nor his custodian at any time took possession or control of the wool warehouse, and that the wool warehouse was at the time of the pretended levy of attachment, and for upwards of five months thereafter continued to be and remain in the possession of G. B. Quarles, who used the same in his business and collected the rent and income therefrom, and at no time did the Sheriff or his deputy or custodian in said action or under said writ of attachment take possession or control of the said wool warehouse, and that the attachment was, under the laws of the State of Idaho, wholly void and ineffectual and no lien, right or interest was ever acquired by the said Citizens National Bank under said pretended attachment.

It is then alleged that on October 2, 1922, the District Court of Lemhi County, Idaho, entered judgment in said action in favor of the Citizens National Bank and against G. B. Quarles for about $5,000.00. About

January 15, 1923, the Citizens National Bank caused a writ of execution to be issued under its judgment against G. B. Quarles and the Sheriff of Lemhi County pretended to levy the writ of execution on the wool warehouse, notwithstanding that the same had been sold on September 30, 1922, to the plaintiffs and that the Citizens National Bank caused the warehouse to be sold under its writ of execution about the 12th of February, 1923, for the sum of $25.00, and that such sale, or pretended sale, under the writ of execution was absolutely void and ineffectual, and did not vest or transfer to the defendant Citizens National Bank any right, title or interest in or to the wool warehouse, but that notwithstanding such void and ineffectual sale, the defendant Citizens National Bank wrongfully took possession of the wool warehouse on or about February 12, 1923, and ever since said date has withheld possession from plaintiffs and from Rose Loring Quarles, and has kept and retained the use, enjoyment, rentals and income from such wool warehouse. The plaintiffs allege that the amount annually collected from said wool warehouse for rental, storage and other uses is upwards of a thousand dollars, and that the defendant has applied such moneys to its own use and benefit during the years 1923, 1924, 1925 and 1926, and has deprived the plaintiffs of the use and benefit of the wool warehouse to which they were entitled ever since the 12th of February, 1923.

As a second cause of action the plaintiffs adopt all of the preliminary allegations of their first cause of action, and further allege that they are the owners of the mortgage from G. B. Quarles to H. L. McCaleb

dated June 1, 1922, and that the indebtedness secured by this mortgage has not been paid and that the mortgage is a first and prior lien upon said wool warehouse, and that the same is due and that they have elected to foreclose the same.

The plaintiffs pray that it may be decreed that the pretended attachment of the defendant during April, 1922, was void and ineffectual and did not create any lien against the wool warehouse, and that it may be adjudged and decreed that the mortgage from G. B. Quarles to H. L. McCaleb as guardian *ad litem* of plaintiffs and dated June 1, 1922, was a first and prior lien on the wool warehouse and that the sale of the same on foreclosure of said mortgage on or about the 30th of September, 1922, vested in and transferred to Rose Loring Quarles good and valid title to the wool warehouse. They further pray that it may be adjudged and decreed that the pretended sale of the wool warehouse on or about the 12th of February, 1923, to the defendant the Citizens National Bank of Salmon under its writ of execution was void and ineffectual and transferred no right, title or interest to said Bank.

They further pray that it be adjudged that the possession of the defendant Citizens National Bank of the wool warehouse since February 12, 1923, has been wrongful and that the defendant wrongfully deprived the plaintiffs and Rose Loring Quarles of the use and enjoyment of said wool warehouse since said date, and that they may have an accounting of the rents, incomes and profits of the wool warehouse which the defendant has applied to its own use and that they may be adjudged and decreed to be the owners of the

wool warehouse, and that the defendant may be ordered and directed to deliver possession thereof to them, and that they may have a judgment against the defendant for the amount found due: to-wit, $1,000.00 a year from February 12, 1923.

The plaintiffs further pray that in the event the Court should for any reason find that the chattel mortgage from G. B. Quarles to H. L. McCaleb as guardian *ad litem* of the plaintiffs has not been legally foreclosed, that plaintiffs may have a decree of foreclosure of the said mortgage and a sale of the wool warehouse.

To this complaint the defendant filed its answer (Rec. pp. 24-44), the allegations and denials of which are not necessary to consider in detail on this appeal, except that the defendant alleges (Rec. pp. 29-31) that the writ of attachment issued out of the District Court for Lemhi County, Idaho, on or about the 17th of April, 1922, in the case of the Citizens National Bank of Salmon vs. G. B. Quarles was placed in the hands of the Sheriff of Lemhi County, Idaho, and that he levied said writ of attachment on the wool warehouse hereinbefore referred to, the same being personal property, and that he took the same into his possession under said writ and duly and regularly appointed a custodian to take possession of the property and that said custodian did take the same into possession and under his control, and held the same as custodian for the Sheriff under said attachment as provided by law, and continued to hold and exercise dominion and control over said property until the same was sold under

execution by the Sheriff to the defendant Citizens National Bank of Salmon.

The defendant also pleaded the statute of limitations as against the right of these plaintiffs to bring this action, and also by its answer challenged the title of the plaintiffs obtained under the foreclosure of their chattel mortgage by the guardian *ad litem*. The Trial Court, however, in its opinion (Rec. pp. 95-106) decided the issue of the statute of limitations against the defendant and held that the action is not barred (Rec. pp. 100, 101), and also held that the guardian *ad litem* had legal power and authority to accept and foreclose the mortgage (Rec. pp. 101-105).

The Trial Court, however, concluded (Rec. pp. 101-106) that the defendant's attachment was legally levied and constituted a prior lien against the warehouse to plaintiffs' claim, and, therefore, ordered a decree of dismissal in favor of the defendant (Rec. p. 106).

The sole question, therefore, presented by this appeal is whether the Trial Court was correct in determining that a valid levy was made upon the wool warehouse under the writ of attachment issued out of the District Court of Lemhi County in the suit of Citizens National Bank against G. B. Quarles on April 17, 1922.

It is admitted that the plaintiffs' rights in this property are based upon the chattel mortgage, Exhibit "A" to the complaint (Rec. pp. 20-23). This chattel mortgage is dated and filed for record *June 1, 1922*. The defendant's claim its levy on the wool warehouse under the writ of attachment was made on *April 17, 1922* (Sheriff's Return, Rec. p. 65), and that the levy of the writ of execution was not made until January 15,

1923 (Rec. p. 67), and sale under the execution was not made until January 22, 1923 (Sheriff's Return, Rec. p. 67). Accordingly, unless its writ of attachment was validly levied on April 17, 1922, the rights of the plaintiffs, obtained by their chattel mortgage, which was filed for record June 1, 1922, are prior to any rights of defendant under its levy and sale under execution in January, 1923.

Substantially all the evidence was taken by depositions.

SPECIFICATIONS OF ERROR

The errors relied upon or pertaining to the decision of the Trial Court upon the matter of the sufficiency of the levy under the writ of attachment are set forth in detail (Rec. pp. 108-111), and stated generally are as follows:

1. That the Court erred in holding and deciding that the lien of the defendant under its attachment was prior and superior to the lien of plaintiffs' mortgage.

2. That the Court erred in holding and deciding that the wool warehouse involved in this action is personal property not capable of manual delivery.

3. That the Court erred in holding and deciding that the provisions of subdivision 5 of Section 6784 of the Compiled Statutes of Idaho apply to the warehouse involved in this action.

The Court in its opinion (Rec. p. 101) decided that the above mentioned subdivision of the Idaho Statute which deals with the attachment of "debts and credits and other personal property not capable of manual

delivery" applied to the attachment of the wool warehouse, and it is appellants' contention that this property does not come within the classification to which the Court refers.

4. That the Court erred in not holding and deciding that the warehouse involved in this action is personal property capable of manual delivery.

5. That the Court erred in not holding and deciding that the provisions of subdivision 3, Section 6784, Compiled Statutes of Idaho, 1919, apply to the warehouse involved in this action.

6. That the Court erred in holding and deciding that the warehouse involved in this action could be attached without taking the same into possession.

7. That the Court erred in holding and deciding the pretended attachment of the warehouse involved in this action was valid and effectual for any purpose.

8. That the Court erred in dismissing plaintiffs' bill of complaint herein.

9. That the Court erred in holding and deciding that H. G. King had such custody and control of the warehouse involved in this action as is required by the statutes of the State of Idaho in order to constitute a legal and valid attachment of such property.

BRIEF OF THE ARGUMENT

Levy upon personal property under writ of attachment must be made by the officer actually seizing the attached property and taking it into his custody and possession and he must assume and maintain actual dominion and control over such property by such

means as will exclude all others from it. When this is not done, the levy is entirely void and ineffectual.

Section 6784, Idaho Compiled Statutes, Subdiv. 3.
6 C. J. pp. 223,226.
Hollister vs. Goodale (Conn.) 21 Am. Dec. 675.
Dutertre vs. Driard, 7 Cal. 549, 551.
Herron vs. Hughes, 25 Cal. 555, 563.
Smart vs. Sosey (Cal.) 193 Pac. 167, 168.
American Fruit Growers, Inc. vs. Walmstead, 44 Ida. 786, 793, 260 Pac. 168.
Green vs. Hopper (Nev.) 167 Pac. 23, 24.

The warehouse involved in this action is personal property capable of manual delivery within the meaning of subdivision 3 of Section 6784, Idaho Compiled Statutes, and a valid levy on attachment could only be made upon the same by the sheriff actually taking and maintaining custody and control thereof either by himself or by a deputy or custodian.

Crisman vs. Dorsey (Colo.) 21 Pac. 920, 922.
Throop vs. Maiden (Kan.) 34 Pac. 801.

ARGUMENT

The only question involved on this appeal is the validity of the attachment of the wool warehouse. The plaintiff alleges (Rec. p. 10) that the same is personal property, and the defendant in its answer (Rec. p. 29) concedes that the wool warehouse is per-

sonal property, and such was the view of both parties throughout the trial, and the Trial Court so regarded the property in his decision (Rec. p. 98). We are, therefore, concerned only with those statutes of the State of Idaho which govern the attachment of personal property. The question is covered by Section 6784 of the Compiled Statutes of Idaho, 1919, which provides that:

> "The Sheriff to whom the writ is directed and delivered must execute the same without delay, and if the undertaking mentioned in Section 6782 be not given, as follows:
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> * * * * * * * *
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> "3. Personal property capable of manual delivery must be attached by taking it into custody.
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> * * * * * * * *
>
> "5. Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts or having in his possession or under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits or other personal property in his possession or under his control belonging to the defendant are attached in pursuance of such writ."

It was defendant's theory when the attachment was levied and plaintiffs' theory throughout this case that the warehouse could only be validly attached by compliance with subdivision 3 above mentioned, and that in so doing it was necessary for the Sheriff to take

actual physical possession of the warehouse either by himself or by a duly appointed custodian. This in fact seems to have been the defendant's theory upon the trial also, as shown by its proof and by the allegations of the answer (Rec. pp. 29-31) wherein it is alleged that the Sheriff did take the warehouse into his possession and did appoint a custodian who continued in possession and control thereof until the property was sold under execution by the Sheriff.

The defendant in its depositions attempted to show that the property had been placed in charge of one H. G. King as custodian immediately upon the pretended levy of writ of attachment on April 17, 1922. This is the recital contained in the Sheriff's return on sale (Rec. p. 65). The testimony in the record, however, overwhelmingly demonstrates that Mr. King, the supposed custodian, never had any such actual custody or control of the warehouse as is required to perfect a valid attachment.

Rose Loring Quarles testifies (Rec. p. 46) that she was at the warehouse at various times all during the summer of 1922 and that G. B. Quarles was in possession at all times, that the warehouse was being used for wool storage, and that he was managing it. G. B. Quarles testifies (Rec. p. 50) that he built the warehouse at the time of the First Liberty Loan, and that ever since November 20, 1918, when he purchased the interest of one George H. Monk, he had exclusive possession of the warehouse until the foreclosure of the chattel mortgage about September 30, 1922. He testifies that the warehouse was not attached by the Sheriff, that he was at no time disturbed in his possession

during the year 1922 up to the time of the Sheriff's sale on the foreclosure of the chattel mortgage, that no one ever demanded the keys to the property, and that he never saw anyone that claimed to be in possession of the property. He testifies (Rec. pp. 51, 85-93) that throughout the summer of 1922, both before and after the time when King is alleged to have been placed in possession of the warehouse as custodian, he (Quarles) handled many wool transactions from the warehouse, stored wool therein and conducted his business therefrom in the usual way. He produced in evidence his checks and receipts and books covering this period showing a sizeable volume of business, all carried on from the wool warehouse, and which could not have been done had the property been in the custody and possession of Mr. King or anyone else. His testimony is undisputed.

John Vernon Quarles, one of the plaintiffs and the son of G. B. Quarles, was in Salmon from June until September in 1922, and he testifies (Rec. pp. 58, 59) that he saw his father handling the business at the warehouse daily. He says that his father was in possession of it, and that the warehouse was being used by his father for receiving, storing and shipping wool, his father had the keys to the warehouse, and he saw his father unlock the warehouse on numerous occasions; he never saw anyone else with the keys in 1922, and never saw Mr. King or anyone else who claimed to be in possession thereof.

The testimony of H. G. King, the alleged custodian, was taken in two depositions, which appear in the record at pages 60 to 63, and 77 to 83.

In Mr. King's second deposition, which appears in the Record, pages 77 to 83, he admits that on May 18, 1922, or during the time when he is alleged to have been acting as custodian of the warehouse, he sold and delivered some wool to Mr. Quarles at the warehouse. He also says that during the summer of 1922, from the time he was appointed by the Sheriff, he did not receive any wool at the warehouse nor collect any rent. He further states that what he had intended to say when he testified in his first deposition that he had to go by the warehouse two or three times a day, was simply that in going back and forth from his home to town in his car he passed along Main Street, which is about two blocks from where the warehouse is situated, and that this distance is approximately 800 feet. This, he says, is what he meant by saying that he went to the warehouse every day, and, as he states (Rec. p. 79), this was the case during all the time he pretended to act as custodian. He further makes it clear (Rec. p. 83) that when he stated he did not find Quarles in charge of the warehouse in 1922, he was basing his statement upon his observation of the warehouse in these fleeting glimpses when he was driving along Main Street about 800 feet distant from the warehouse.

We believe that the testimony of Mr. King shows beyond any question that he had literally complied with the suggestion of the Deputy Sheriff that the duties would not be onerous. He was custodian in name only. He was obviously never in possession of the warehouse.

The fact that Mr. King never had any physical control, custody or possession of the property is further

shown by the testimony of W. C. Smith (Rec. pp. 73-75). Mr. Smith handled the warehouse in the fall of 1922 after Mr. Quarles left Salmon. He says that Mr. Quarles was in exclusive possession up until that time.

Mr. J. Z. Moore, the freight agent of the Gilmore & Pittsburgh Railroad Company, upon whose right-of-way the warehouse was located, also testifies (Rec. pp. 74, 75) that Mr. Quarles was in exclusive possession. This is also shown by the testimony of Louis F. Ramey (Rec. pp. 76, 77), who sold wool to Mr. Quarles at the warehouse during June and July, 1922, and who says that Mr. Quarles was in possession at that time, and that Mr. King was not there.

The fact that the Sheriff never had any possession or control of the wool warehouse during the time when the same is alleged to have been held under the writ of attachment is further shown by the testimony of Mr. T. J. Stroud, the Sheriff. Mr. Stroud testifies (Rec. pp. 67-73) that Mr. Kirtley, his deputy, now deceased, handled the matter. When asked if he had possession of the warehouse (Rec. p. 72), he says that he had possession through his keeper, Mr. H. G. King, but that he did not have actual possession himself.

We feel that on the record presented to this Court, there can be no question but that the assertion that the Sheriff took possession of the warehouse under the writ of attachment and placed a keeper or custodian in charge, is a mere fiction. The evidence, practically without dispute, shows that Mr. G. B. Quarles, the party against whom the writ of attachment was issued, remained in sole, exclusive and undisputed possession

until long after the execution of the chattel mortgage upon which the plaintiffs base their claim.

Such being the facts with reference to the actual situation regarding the custody and control of this personal property during the supposed period of attachment, it is appellants' contention that the levy was wholly ineffectual and void.

The principle of law governing this situation is well stated in 6 C. J. page 223:

> "It may be stated as a general rule that, in order to make a valid levy upon personalty, the officer executing the attachment must assume dominion over the property; he must not only have the property in view, but he must assert his dominion over it by such acts as would render him liable to an action for trespass but for the protection afforded him by process, or, as stated in some decisions, the officer must assume such control and possession over the property that the real owner may bring replevin."

It is, of course, doubtless true that the Sheriff could not be expected or required to actually remove this property from the place where he found it, but even in such case, the very purpose of an attachment requires that he do take it into his custody and that he retain such exclusive control over the same that the adverse party and all others are excluded therefrom.

Thus in 6 C. J. page 226, the rule is stated:

> "In the case of tangible property susceptible of manual seizure and delivery, and not in the pos-

session of a third person, such property must be actually seized and taken into possession by the levying officer; but while the possession must be actual in the sense that he takes the property from the immediate control of defendant and gives the officer control over it, so that he is able to touch or remove it, the officer may take and maintain the actual custody and control of the property without actually touching or handling the same, by such means as will exclude all others from the custody, or will give timely and unequivocal notice of the custody of the attaching officer."

In Hollister vs. Goodale (Conn.), 21 Am. Dec. 675, in discussing the meaning and purpose of an attachment with reference to personal property, the Court says:

"1. The word 'attach,' derived remotely from the Latin term 'attingo,' and more immeidately from the French 'attacher,' signified to take or touch, and was adopted as a precise expression of the thing; nam qui nomina intelligit, res estiam intelligit.

"The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent that to attach is to take the actual possession of property. Hence, the legal doctrine is firmly established, that to con-

stitute an attachment of goods, the officer must have the actual possession and custody. It was laid down in these express words by Parsons, C. J., in Lane, et al. vs. Jackson, 5 Mass. 157, 163, and by Parker, C. J., in Train vs. Wellington, 12 Id. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle."

In Dutertre vs. Driard, 7 Cal. 549, 551, the Court says:

"Under our statutes, a levy on personal property capable of manual delivery must be made by taking the property into custody. If the execution creditor permits the property levied on to remain in the hands of the debtor, levy cannot operate to defeat subsequent executions."

In Herron vs. Hughes, 25 Cal. 555, 563, the Court says:

"In the language of the plaintiff's counsel: 'The levy of the constable was a fiction. The sale was a mockery and void. The constable made no levy because he had no possession of the property, nor even had sight of it. He made no sale because he could make none. Before he could sell, he must have levied; he must have had the right and possession and control of the property levied upon, after which he must have advertised and proceeded according to law, to their sale. The purchaser at

such a void sale could acquire no title and much less could a purchaser with full knowledge."

In Smart vs. Sosey (Cal.), 193 Pac. 167, 168, the Court says:

> "The nature of the possession and custody essential to the validity of an execution is indicated by the statement 'that it shall be such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn, or taken by another, without his knowing it.' Freeman on Executions (3d Ed.), 262. In the instant case, the absence of the keeper abandoned the property to the control of the debtor. The articles were not locked up, they were not inventoried or marked, or seasonably removed. Under these circumstances, the levy could not have operated to defeat a subsequent execution. Dutertre vs. Driard, 7 Cal. 549."

The Supreme Court of the State of Idaho has uniformly taken the same view, that personal property can only be effectually levied upon under writ of attachment by actual seizure and possession by the Sheriff, and it is also required that he maintain such actual physical possession, either by himself or through his agency of a duly appointed keeper. In considering this question in American Fruit Growers, Inc., vs. Walmstad, 44 Ida. 786, 793, 260 Pac. 168, the Supreme Court of this State on October 16, 1927, announced the following principles:

"3. In case of tangible property, susceptible of manual seizure and delivery, such property must be actually seized and taken into possession by the levying officer, and that officer must take and maintain actual custody and control of the property by such means as will exclude others from such custody. (6 C. J. 226, 227; Crisman vs. Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664; Falk-Block Etc. Co. vs. Branstetter, 4 Ida. 661, 43 Pac. 571; Green vs. Hooper, 41 Nev. 12, 167 Pac. 23.)

"'A sheriff levying upon personal property left a portion thereof in an outbuilding, one of the debtors having the key. He assumed to levy upon them but did not take actual possession thereof. One 'J' agreeing to be responsible for all the property, it was left with him until day of sale. Held, that the levy was insufficient.' (Rix vs. Silknitter, 57 Iowa, 262, 10 N. W. 653.)

"In Keith vs. Ramage, 66 Mont. 578, 214 Pac. 326, it was held that the abandonment of attached property by the sheriff's keeper is an equivalent to a surrender of the property by the sheriff. It is requisite, therefore, that the levying officer take actual manual possession of the property attached, and that he maintain the same, either personally or through the agency of a keeper."

The Supreme Court of Nevada, construing the attachment statute of that state with reference to the attachment of personal property, identical with subdivision 3 of Section 6784 of the Compiled Statutes of

Idaho above mentioned, has well summarized the decisions of the Supreme Courts of a number of states in Green vs. Hopper, 167 Pac. 23, 24:

> "(4) It has been stated as a proposition of law, and such is well supported by authority, that it is the duty of the attaching officer to take the property attached into his possession; and the lien of such attachment, so far as subsequent purchasers and other creditors are concerned, is dependent upon the continuance of such possession. If, therefore, the officer abandons his possession, the lien will be ineffective as against such. Chadbourne vs. Sumner, 16 N. H. 129, 41 Am. Dec. 720; Sanford vs. Boring, 12 Cal. 539; Taintor vs. Williams, 7 Conn. 271; Nichols vs. Patten, 18 Me. 231, 35 Am. Dec. 713; Baldwin vs. Jackson, 12 Mass. 131; Sanderson vs. Edwards, 16 Pick. (Mass.) 144. In the case of Gower vs. Stevens, 19 Me. 92, 93, Am. Dec. 737, the rule is stated that:
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> "'To constitute and preserve an attachment of personal property, by process of law, the officer serving such process must take the property and continue in possession of it either by himself, or by a keeper by him appointed for this purpose. It has never been understood that he could, consistently with the preservation of the lien, constitute the debtor his agent to keep the chattels attached. Except so far as authorized by special statute provision, he cannot leave such property with the debtor, without dissolving the attachment.'

> "To the same effect are the cases of Becker vs. Steele, 41 Kan. 173, 21 Pac. 169, and Loveland vs. Alvord Cons. Quartz Mng. Co., 76 Cal. 562, 18 Pac. 682."

Obviously Mr. King's connection with this wool warehouse was limited to an occasional and casual glance of the same as he traveled down Main Street of Salmon in his car, about 800 feet distant. It was the same as that of any other person driving along Main Street. The undisputed testimony shows that the other witnesses did not even know that Mr. King claimed to be custodian and we are wholly unable to understand how it could be concluded from these facts that there was any attempt to comply with the statute. Surely if there was such an attempt, it fell far short of the attainment of that sole, exclusive and notorious possession which the law requires. It is said in 6 C. J., page 223:

> "He must not only have the property in view, but he must assert his dominion over it by such acts as would render him liable to an action for trespass but for the protection afforded him by process, or, as stated in some decisions, the officer must assume such control and possession over the property that the real owner may bring replevin."

The Trial Court, however, took the view that the property involved in this action was attached by a compliance with the provisions of subdivision 5 of Section 6784, which provides:

> "Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts or having under his control such credits or other personal property, or with his agent, a copy of the writ, and a notice that debts owing by him to the defendants or credits or other personal property in his possession or under his control belonging to the defendant are attached in pursuance of such writ."

The Trial Court observes in his opinion (Rec. p. 103) that the Sheriff did attach the property in compliance with the provisions of the above quoted subdivisions by serving upon Quarles a copy of the writ of attachment and a notice that the property then in his possession was attached. He goes on further to say that the return of the Sheriff recites that the Sheriff placed the same in the hands of H. G. King as custodian. The Court then adds that at the time the Sheriff made the attachment he appointed King custodian and gave him the key.

The record is quite unsatisfactory as to the proof of the Sheriff having delivered a copy of the writ of attachment and the notice to Mr. Quarles, and is equally indefinite as to when, if ever, this was done. It will be noted that the Sheriff's return (Rec. p. 65) does not contain any mention of the service of such notice on Quarles, and Mr. Stroud, the Sheriff, admits (Rec. p. 70) that he does not know whether the notice was served.

However this may be, it is appellants' contention that since the record clearly shows that the Sheriff did

not take and retain actual custody or control of the property, either by himself or through the agency of any deputy or custodian, it must follow that there was no valid levy upon the property. The method of attachment prescribed in subdivision 3 of Section 6784 is the exclusive method whereby personal property such as this warehouse could be validly attached and levied upon. This is the method, and the only method prescribed for the attachment of tangible personal property. The provisions of subdivision 5 obviously apply to the attachment of debts, credits and other intangible personal property.

The Supreme Court of Colorado, in Crisman vs. Dorsey, 21 Pac. 920, 922, in discussing the provisions of the personal property attachment statutes of that state, similar to those of Idaho, has said:

> "The constable to whom the writ is delivered shall execute the same without delay, and, if the deposit be not made or the undertaking given as hereinbefore provided, then as follows: (1) Personal property, capable of manual delivery, shall be attached by taking the same into the custody of the constable; (2) Debts, credits, and other things in action, which are not capable of manual delivery, shall be attached by leaving with the person owing such debts, * * * or with his agent, a copy of the writ of attachment, etc. The meaning of the language of the section quoted is clear and unmistakable. Under it, it is the duty of the officer to execute the writ of attachment by taking personal property 'capable of manual de-

livery' into his custody. The nature of the property required to be taken into custody is clearly disclosed by the language of the section. All personal property, capable of manual delivery, must be taken into custody; that is, into the care and possession of the officer. Manifestly, within the meaning of this section, all chattels—all tangible personal property—is capable of manual delivery. The kind of property which is not capable of manual delivery, within the meaning of the statute, is as described in the second subdivision of this section. Such property consists of debts, credits, and other things in action. In other words, it is choses in action, as distinguished from tangible property or chattels. Under the section cited, it is clear that the writ of attachment can only be executed as to personal property which is capable of manual delivery by taking it into custody, and that within the meaning of the statute all personal property subject to attachment, except choses or things in action, is capable of manual delivery. *The fact that the property to be attached consists of bulky articles, difficult of removal, does not excuse the failure of the officer to take possession. To do this it may not be necessary to remove the property from the place in which it is found. Nevertheless it is incumbent upon him to do whatever may be necessary to take the property into custody. After the levy of the process the possession of the property should be his. It should be subject to his dominion and control. His possession must be exclusive. His dominion cannot be shared with the defendant. The effect of the levy must*

be to place the property in custodia legis. It cannot be held adversely to the Court or to the officer. The officer must be clothed with the indicia of ownership. The effect of the steps taken by him must be to charge the property with a lien, and create a special property therein, which will enable him at all times to protect and maintain his possession, and hold the property subject to the order of the Court until the attachment shall be dissolved. The provisions of the statute cited will admit of no other construction." (Our italics.)

In Throop vs. Maiden (Kan.), 34 Pac. 801, the Court says:

"To constitute a valid attachment of personal property, it is necessary for the officer, where he can obtain possession, to take the property into his cusody, and hold it subject to the order of the Court, and a levy by an officer who does not obtain actual control over the property levied upon is invalid. Civil Code, 198; Lyeth vs. Griffis, 44 Kan. 159, 24 Pac. Rep. 59. A manual seizure or a removal of the property by the officer is not always required, but he must assume the control of the property by virtue of the writ, and exercise such dominion over it as the character of the property will permit. *This dominion and control must be exclusive and continuous, and if the officer levying does not take and retain control by himself, or some one appointed for that purpose, the levy is invalid, against parties who subsequently obtain a lien on, or*

interest in, the property. It has been held that the custody should be such 'as will enable the officer to retain and assert power and control over the property, so that it cannot probably be withdrawn, or taken by another without his knowing it.' Drake, Attachm. 256. 'It is not essential that the property should be moved or touched. It is enough that the officer assumes control under the writ, and keeps someone in charge of the property. * * * The possession of the officer must not be temporary in its character. It must continue as long as it is desired that the attachment lien should remain in force. *An abandonment of the possession is an abandonment of the levy. The property must not be restored to the real or apparent custody of the defendant. The change of possession must be actual and substantial, and not merely formal or colorable.* It is not indispensable that the officer should be in visible possession every moment; but his connection with and control of the property ought, nevertheless, to be so continuous that it cannot probably be removed or disturbed without his knowledge.' Freem. Ex'ns, 262." (Our italics.)

The Trial Court in his decision (Rec. p. 102) states that the warehouse in question is not capable of manual delivery, and, therefore, reaches the conclusion that it must be attached pursuant to the provisions of subdivision 5, which mentions "other personal property not capable of manual delivery."

There is absolutely nothing in this record to indicate that this warehouse is of such a character that it is

not capable of manual delivery. Both parties and the Court concede that it is personal property and the record shows that it stood upon the right-of-way of the Gilmore & Pittsburgh Railroad Company, and that such real estate, accordingly, was not owned by the owner of the warehouse. "Manual delivery" as used in the attachment statutes does not mean delivery by hand or removal from the position in which the property was prior to the levy. All of the cases above mentioned show that this is not the meaning of the term, and as said in Crisman vs. Dorsey, supra, the fact that the property is bulky does not excuse the failure of the officer to take possession. It is necessary under such circumstances for the officer to do whatever may be necessary to take the property into his custody. It is too apparent for argument that it was not impossible for the plaintiff to take actual control and custody of the property in this case. In fact, that is what he stated in his return that he did, and there is no excuse shown for his failure to actually place and maintain a custodian or keeper in charge. The evidence clearly shows that the Sheriff made no effort whatever to invest himself with such custody and control as was easily possible and entirely to be expected under the circumstances.

The appellants believe that the foregoing cases, and particularly Crisman vs. Dorsey, demonstrate the fallacy of the Trial Court's conclusion that the provisions of subdivision 5 of Section 6784 apply to the attachment of property such as this. This property is neither a "debt" nor a "credit," nor is it, in the true meaning of the term, "personal property not capable of manual

delivery." We think that it is evident that the phrase last above mentioned is intended to apply exclusively to intangible personal property, or at least to such personal property as may be impossible for the Sheriff to take into his possession either by actually handling the same or by placing someone in charge thereof.

The Trial Court's conclusion seems to be based upon what is said by the Supreme Court of California in the case of Rudolph vs. Saunders, 111 Calif. 233, 43 Pac. 619. The Trial Court cites this case as supporting his views in his opinion (Rec. p. 103). The property involved in the above case, however, was a growing crop of thirty acres of beans and the California Court reaches the conclusion that this property was not capable of manual delivery, and that, therefore, it must be attached as personal property not capable of manual delivery. Obviously the nature of the property with which the California Court was dealing and that which is the subject of the attachment in this case is very different.

It should, moreover, be observed that subdivision 5 of Section 542 of the Code of Civil Procedure of California, which deals with personal property not capable of manual delivery, is not the same as Section 5 of the Idaho Statute above set forth, but contains in addition the following provision:

> "except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached and a notice that it is attached, shall be recorded the same as in the attachment of real property."

We contend, therefore, that the case upon which the Trial Court bases his decision offers no analogy, and considering the difference in the statutes applicable to the particular property with which the California Court was dealing, the case lends absolutely no support for the views adopted by the Trial Court.

As shown by the cases from the Supreme Court of Idaho and from other states heretofore cited, the very idea and purpose of an attachment of personal property is to place the same within the exclusive control and custody of the officer, in so far as the nature of the property will permit. There has been no attempt at even a substantial compliance with the statute until the officer has done all that is reasonably possible for him to do, considering the circumstances and the nature of the property, in order to place the same under his custody and control.

All the evidence in this case was taken by depositions with the exception of part of the evidence of G. B. Quarles, who was present at the trial and testified orally and identified exhibits which were introduced in evidence (Rec. pp. 85-93). This Court, therefore, is in as good a position as was the Trial Court to determine the weight and effect of the evidence, and we are firmly convinced that this Court can reach but one conclusion as to the custody and control of the warehouse, and that is, that neither the Sheriff nor Mr. King had any control, custody or possession of the warehouse at the time the chattel mortgage was given, but that the warehouse then was, long prior thereto had been, and for several months thereafter was, in the absolute pos-

session and under the dominion and control of G. B. Quarles.

We are likewise of the opinion that the Trial Court misconstrued the Idaho statute applicable to the attachment of this warehouse; that the attachment was absolutely ineffectual and void and created no lien in favor of defendant and appellee, and that plaintiffs' mortgage attached became a lien on the building long prior to the levy and sale under execution in January, 1923, by the Citizens National Bank. Hence, the sale under the foreclosure of plaintiffs' mortgage passed the title to the building to Rose Loring Quarles for plaintiffs' benefit and plaintiffs are entitled to a decree quieting their title to the warehouse.

The order dismissing the bill should, therefore, be set aside and the Trial Court directed to enter a decree quieting plaintiffs' title.

Respectfully submitted,

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